

Application No. 10/694,960
AMENDMENT AFTER FINAL dated May 27, 2009
Reply to Office Action of February 27, 2009 and
Advisory Action of May 21, 2009

REMARKS

I. Canceling Claims 1-7

Claims 27-42 are pending. Claims 1-7 are cancelled. The claims stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Lait (1993) 73, 381-388 ("Gupta 1993") or 5,750,177 ("Yee").

In a previous After Final response dated May 11, 2009, Applicants amended independent claim 1 to require an emulsifier. In response, an Advisory Action was entered on May 21, 2009 that did not enter the Amendment stating "[t]he amendments to claim 1 . . . raise new issues that would require further consideration and search."

In order to simplify and further prosecution, Applicants hereby cancel claims 1-7. Thus, the remaining claims are claims 27-42, which were pending in the application prior to the After Final response. Independent claim 27 is identical to claim 1 as it was set to be amended in the After Final response of May 11, 2009 (which was not entered). Applicants respectfully note that independent claim 27 was added to the application in a Request for Continued Examination that was previously entered on June 7, 2006.

As independent claim 27 already existed in the application, it is reasonable for Applicants to assume that the subject matter of independent claim 27 was already considered and searched because it has been of record for almost three years. It is respectfully pointed out that the Advisory Action may have misunderstood that independent claim 27 was identical to claim 1 as amended in the previously submitted After Final response that was not entered. Thus, the present amendment simplifies prosecution, and Applicants respectfully request this After Final response be entered, because at a minimum, by canceling claims 1-7, the issues for Appeal are simplified.

As the previous Amendment was not entered, Applicants reproduce the discussion from the May 11, 2009 response below. The discussion applies equally to the remaining claims and, in particular, to existing independent claim 27 because this claim required the presence of an

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emulsifier, which the Office Action indicated was lacking from claim 1. Thus, Applicants respectfully believe that independent claim 27 should be allowable over the current art of record in light of the discussion during the phone interview on May 5, 2009 and the previous three Declarations under 37 C.F.R. § 1.132.

II. Interview Summary

Applicants thank the Examiner for the courtesy extended during the phone interview on May 5, 2009. During the phone call, the Declaration of Dr. Fui Mei ("the Dr. Mei Declaration") was discussed. Applicants explained the distinction in the Dr. Mei Declaration between the data in Tables 6 and 8 reported therein. This response summarizes the distinction in more detail. In light of the discussion during the interview, Applicants understand that, in view of the Dr. Mei Declaration, the claims likely overcome the art of record, but that the Examiner will need to reconsider the art and the Declaration again.

Regarding the rejections in the Office Action dated February 2, 2009, Applicants incorporate the previous response filed December 2, 2008 in its entirety along with the Supplemental Declaration of Dr. Isabelle Laye and the Declaration of Dr. Fui Mei. The previous response and Declarations address the rejections to the claims under 35 U.S.C. § 103(a). Applicants respectfully request reconsideration of the previous response and Declarations in light of the substance of the interview held on May 5, 2009.

Additionally, regarding the previously submitted Declaration of Dr. Isabelle Laye, the present Office Action stated that the Declaration was not commensurate in scope with the broadest claim because claim 1 does not require the presence of an emulsifier. (Office Action, February 27, 2009, p. 4.) Applicants have cancelled claims 1-7. Independent claim 27, which has been of record since the Request for Continued Examination filed on June 7, 2006, already requires the presence of an emulsifier and, thus, is commensurate with the Declarations filed.

The present Office Action also indicated that the Dr. Mei Declaration did not explain the differences in the height decrease provided in Table 6 relative to the melting point data of

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Table 8. As discussed in the phone interview of May 5th, the height decrease in Table 6 was merely provided as evidence to show that the cheese made according to the description of Gupta was duplicated as best as possible because similar height decreases were observed in the duplicate cheese as compared to that reported by Gupta using his non-standard softening or melting quality test. The decrease in height as reported by Gupta is an indication of cheese softening, but is a measurement of a completely different characteristic of cheese from the melting point/dropping point as measured by a Mettler Dropping Point Furnace, which is provided in Table 8 of the Dr. Mei Declaration.

The data in Table 8 of the Dr. Mei Declaration is a measurement of "dropping point," which is the same characteristic of cheese as defined in the present specification and, thus, the claims. As stated in the present specification, the dropping point temperatures were determined using a Mettler FP-83 Dropping Point Furnace. (Specification, page 13, line 29 to page 14, line 4.)

The dropping point test measures the characteristic of a cheese when it turns to a flowable liquid sufficient to drop through a capillary cell and then fall to trigger a sensor located below the capillary cell. As evidenced by the data provided in Dr. Mei's Declaration in Table 8, the cheese of Gupta did not flow at all or melt at 212°F when using the same dropping point test as defined in the present specification. The claims define melting point (which the specification defines as measured by a Mettler Dropping Point Furnace) between 105°F and 150°F. Gupta's cheese is far outside this range. (Dr. Mei Declaration, ¶¶ 28 and 29.)

Specifically, as provided in Table 8 of the Dr. Mei Declaration, *the 20% Gupta sample had a casein to whey ratio within those required by the claims (i.e., 1.7:1), but did not have a dropping point melt required by the claims as measured by the same test used in the present application (no melt at 212°F)*. (Dr. Mei Declaration, Table 8 and ¶¶ 28 and 29.) This is direct factual evidence of non-obviousness. Thus, the cheese of Gupta can not anticipate or suggest the claims are obvious. There is no disclosure or other evidence in Gupta or Yee that describe

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how to achieve a cheese with a casein-to-whey ratio between 3:1 and 1:1 that has the dropping point melt between about 105 and 150°F as required by the claims.

This factual and scientifically established evidence can not be ignored. *Ex Parte Whalen*, 89 USPQ2d 1078, 1083-84 (BOPAI, July 23, 2008) states that a conclusion of obviousness in an Office Action must be supported with “evidence or scientific reasoning” and that a conclusion of obviousness is improper if it can not be supported with “any explanation based on scientific reasoning.” In light of the factual evidence provided in the two declarations previously submitted, if the Office Action continues the rejections based on Yee and Gupta, it is respectfully requested that evidence or a scientific reasoning be provided in response why the factual data provided in the Declarations, which provide a direct comparison using the same test method, are inadequate.

Reconsideration and allowance of claims 27-42 are respectfully requested as none of the cited references either alone or in combination disclose or suggest the claimed melting points in a processed cheese having the defined casein-to-whey ratios. All that the cited prior art references demonstrate is that increasing the amount of whey in processed cheese to the levels of the claims results in an increased melting point as determined by a Dropping Point Furnace. The claimed processed cheese, on the other hand, does indeed show unexpected results because the claimed melting points as determined by a Dropping Point Furnace are much lower than expected from either Gupta 1993 or Yee as demonstrated in the three declarations provided in the previous responses.

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The Commissioner is hereby authorized to charge any additional fees which may be required with respect to this communication, or credit any overpayment, to Deposit Account No. 06-1135.

Respectfully submitted,
FITCH, EVEN, TABIN & FLANNERY

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